

The Administrative Tribunal,

Considering the complaint filed by Mr F.P. against the International Labour Organization (ILO) on 1 September 2003 and corrected on 11 March 2004, the ILO's reply of 27 May, the complainant's rejoinder of 19 August, and the Organization's surrejoinder of 28 October 2004;

Considering the second complaint filed by the complainant against the ILO on 21 April 2004, the ILO's reply of 8 September, the complainant's rejoinder of 15 October, and the Organization's surrejoinder of 14 December 2004;

Considering the third complaint filed by the complainant against the ILO on 7 June 2004, the ILO's reply of 8 September, the complainant's rejoinder of 15 October, and the Organization's surrejoinder of 14 December 2004;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. The complainant, a Spanish national born in 1957, worked for the International Labour Office, the Organization's secretariat, under a series of short-term contracts as a translator at the T.2 grade, between October 1993 and October 1994. He then was given a special short-term contract as editor/reviser. Meanwhile, he had been selected through a competition for a position as translator in the Spanish Unit. He was appointed to that post from 1 January 1995 under a fixed-term contract, at grade P.3.

By Vacancy Announcement No. 2001/4, dated 23 May 2001, an internal/external competition was opened to fill the post of senior translator/reviser (Head of Spanish Unit) at grade P.5. As for the experience required, the vacancy announcement, which was in Spanish, specified the following: "At least ten years of professional experience in the field of translation and revision, and at least five years experience at the international level in a senior position. Experience in the organization of translation and revision work during meetings and conferences."* The complainant applied and was selected for the post. He was appointed with effect from 1 April 2002. In a minute of 26 March 2002 from the Resourcing Unit, which was addressed to the complainant's responsible chief and copied to the complainant, it was stated that the latter would underfill the position at grade P.4. and would "be promoted to P.5 on completion of a satisfactory performance appraisal after one year in the post".

One of the internal candidates contested the complainant's appointment, alleging that he did not meet the minimum requirements specified in the vacancy announcement. She filed a grievance with the Joint Panel. Having received no final decision in a timely manner, she filed a complaint with the Tribunal on 3 March 2003. The Organization informed her on 9 April 2003 that the Director-General had decided to cancel the competition and the ensuing appointment. In Judgment 2287, delivered on 4 February 2004, the Tribunal awarded her compensation for moral injury.

By a minute dated 10 April 2003, the complainant in the present case was officially notified of the Director-General's decision to set aside competition 2001/4. The minute stated that "some aspects of the competition procedure have not been such as to guarantee the required transparency and objectivity, in particular concerning the minimum requirements for the post and the manner in which they have been applied in respect of the various candidates". It went on to say that the decision would have "no effect on the grade at which [he was] initially appointed as a result of the competition", and that a new competition would be organised. The complainant thereafter remained as acting head of the Spanish Unit. A favourable performance appraisal report, covering the period from 2 April 2002 to 1 April 2003, was completed by his responsible chief in May 2003.

Having met with the Director of the Human Resources Development Department (HRD) on 14 April 2003, the complainant sent him a minute on 15 April, confirming the request he made during the meeting for the disclosure

of certain information and documents in relation to the Director-General's decision to annul the competition. On 19 May the complainant filed a request for disclosure of information with the Ombudsperson.

By a letter of 2 June 2003, the Director of HRD informed the complainant of the reasons for the Director-General's decision. He explained why the complainant would keep grade P.4 and why certain documents could not be disclosed. In the concluding paragraph he said that the letter constituted a final decision within the meaning of Article VII of the Statute of the Tribunal, and could be appealed against directly to the Tribunal. In his first complaint to the Tribunal, the complainant impugns the decision of 2 June.

On 5 June 2003 the complainant formally referred a grievance to the Ombudsperson. The latter issued a report on his case on 10 September 2003.

By a minute of 16 June 2003 to the Director of HRD, the complainant requested promotion to P.5 with effect from 1 April 2003. Having received no reply, on 15 September 2003 he submitted a first grievance to the Joint Panel, seeking promotion to that grade. The Joint Panel found in his favour, recommending that he be promoted to P.5 as of 1 April 2003. In a letter of 23 January 2004 sent on behalf of the Director-General the complainant was informed that there was no legal basis for an entitlement to promotion to P.5. That is the decision impugned in the second complaint.

On 28 October 2003 the complainant had filed a second grievance with the Joint Panel, seeking full disclosure of documents and certain information in relation to the decision to annul competition 2001/4. He also requested a special allowance for assuming duties at P.5 level, and claimed legal costs. During the grievance proceedings he made specific requests for documents on 4 December 2003 and 9 January 2004. The Director of HRD forwarded these additional documents to him on 16 December 2003 and 19 January 2004. On 21 November 2003 the complainant was granted a special allowance at the P.5 level, with retroactive effect to 1 October 2002. The Joint Panel issued its report on the complainant's second grievance on 30 January 2004. It recommended that the Office seek the opinion of the Ombudsperson on the "disclosure of documents still in dispute", and that the Office should pay the complainant's legal costs in the sum of 3,000 Swiss francs. The Director-General did not accept either recommendation, and his final decision was communicated to the complainant by letter of 10 March 2004. That is the decision impugned in the third complaint.

On 28 November 2003 the complainant had filed a third grievance with the Joint Panel, seeking the quashing of the Director-General's decision to set aside competition 2001/4.

B. The first complaint stems from the Director-General's decision of 10 April 2003 setting aside competition 2001/4. The complainant submits that it was clear from the letter of 2 June 2003 that the decision to annul the competition was flawed and therefore cannot stand. The Organization made an incorrect assessment of his experience and was wrong in assuming that he did not have the qualifications for the post at issue. The Director-General's decision to annul the competition was based on mistakes of fact and the erroneous conclusion that the competition process was procedurally flawed. Such, the complainant argues, was not the case because he did in fact meet the mandatory requirements of the vacancy announcement. He had had at least ten years' professional translation and revision experience, and at least five years at the international level in a senior level position, as well as experience in organising translation work in meetings and conferences. In setting aside the competition and quashing his appointment on the basis of the terms of the vacancy announcement, he claims that the Organization showed prejudice, bias and misuse of authority.

The setting aside of the competition caused him moral injury. As an indication of the moral injury suffered, he states that the complainant who brought the case culminating in Judgment 2287 approached a number of international organisations seeking information regarding his experience. By not preventing such "harassment" the Office failed in its obligation to ensure a harassment-free working environment. Furthermore, he believes that his extensive involvement in the Staff Union generated bias against him and that too had contributed towards the setting aside of his appointment. He contends that the impugned decision had a detrimental effect on his career and professional reputation.

The complainant also alleges that he was denied due process. He considers that by specifying in the letter of 2 June 2003 that the only avenue of appeal was to the Tribunal, the Organization was irregularly denying him "full access" to the Joint Panel, which entitles him to redress.

In his first complaint, he requests the disclosure of specific documents, including the Organization's pleadings in the case which led to Judgment 2287. He asks the Tribunal to quash the decision of the Director-General to annul competition 2001/4 and order his reinstatement in the position of Head of the Spanish Unit, at grade P.5, with full retroactive effect including payment of the salary and benefits due. He seeks 110,000 United States dollars in moral damages, costs, and any other relief deemed equitable by the Tribunal.

The complainant's second complaint is directed against the Office's refusal to promote him to grade P.5. He contends that he had been assured that he would be upgraded from P.4 to P.5 upon satisfactory completion of one year's service. That condition, he argues, has now been achieved because the performance appraisal issued in May 2003 clearly indicated that his performance had been satisfactory. On the basis of the Tribunal's case law, he says that as he had accepted the position as Head of the Spanish Unit in good faith, the Office had a duty to grant him promotion in order to protect him from any injury resulting from the quashing of his appointment, particularly as the setting aside of the competition was due to no fault of his own and occurred after he had fulfilled all the necessary conditions for his promotion. By refusing the promised promotion to P.5, the Office had failed in its duty to shield him from damage, and he claims he is entitled to compensation for what amounted to breach of contract.

In his second complaint too, the complainant requests the production of specific documents. He chiefly seeks the quashing of the decision not to promote him; reinstatement in the position of Head of the Spanish Unit, at grade P.5, with retroactive payment of the salary and benefits due; moral damages in the sum of 25,000 Swiss francs; and costs.

The purpose of his third complaint is to obtain "complete" document discovery. His main argument is that there has not been equal access between the parties to the relevant documents. By denying him access to documents which were the "only means of proving his case", the Organization has denied him the right to a "fair trial" as it is understood in human rights law. He states that there has been a "systematic failure to provide adequate document discovery". He believes there was an element of malice in the deliberate withholding of documents that were needed in the context of his "primary" case. He also appeals against the Director-General's decision not to pay him legal costs for the proceedings initiated on 28 October 2003 before the Joint Panel, arguing that it became necessary to obtain legal representation because of the Organization's "reticence" in providing the required documents.

In his third complaint he primarily seeks the quashing of the decision of 10 March 2004. He claims 3,000 francs in costs in respect of the grievance he filed on 28 October 2003, as well as the subsequent costs incurred to date. He asks that complete document discovery be granted, as sought by him since 19 May 2003 when he submitted his request for disclosure to the Ombudsperson. He also claims damages for moral injury.

C. In each of the three replies it filed, the Organization raises objections to the receivability of the complaints. It considers that the complainant has resorted to an abusive use of the right to appeal, given that all his appeals relate to the decision to set aside competition 2001/4. Believing the first complaint to be irreceivable, it seeks the joinder of the second and third complaints by the Tribunal.

With regard to the first complaint, the ILO states that the fact that the complainant decided to appeal to the Tribunal against the decision of 2 June 2003 while at the same time filing grievances stemming from the same decision with the Joint Panel, renders the first complaint premature and hence irreceivable. It explains why it allowed the complainant to appeal the decision of 2 June directly with the Tribunal. It did so because when that decision was issued, competition 2001/4 formed the subject matter of the case that had already been brought before the Tribunal by one of the internal candidates. The Organization contests the receivability of the complainant's claim for moral damages on the ground that no such claim was made in the complainant's minute of 15 April 2003, nor in the context of the parallel internal procedures.

Subsidiarily, the Organization argues that the complainant's first complaint is devoid of merit. Contrary to his assertions, it cannot be said that he had held a senior level post in an international organisation prior to applying for the post under dispute. It considers that the Director-General's decision to set aside competition 2001/4 was justified, and it lists reasons why that was so. There were grave doubts about "the transparency and objectivity of the process" which put in doubt its lawfulness. Special care was taken to avoid the complainant's reputation being affected, and he was shielded from any negative consequences deriving from the setting aside of the competition. Concerning the request for disclosure of documents, it considers that it has supplied the complainant with the documents that were material to the impugned decision.

Regarding the receivability of the second complaint, the Organization also considers the complainant's claim for moral damages to be irreceivable as he made no such claim in the internal grievance related to his non-promotion.

On the merits of the second complaint, it holds the view that all potential effects of the initial outcome of competition 2001/4 disappeared when the decision was taken in 2003 to annul the competition. The effect of the annulment *ab initio* of the appointment decision was that the appointment was deemed never to have been made. Even if the decision of 26 March 2002 could be seen as a promise, the complainant's situation in law was altered between the date the alleged promise was made and the date on which fulfilment of the promise was allegedly due. He was wrong in assuming that all he had to do to obtain promotion was complete one year of satisfactory service. His performance had also to be deemed up to the level of the responsibilities of the post, and a recommendation had to be made by his responsible chiefs. While recognising that the case law places obligations on the Organization when the appointment of a successful candidate is quashed, the ILO maintains that it was under no obligation to protect an official from "hypothetical injury". It respected the case law by maintaining the complainant at P.4, the grade he had been promoted to on 1 April 2002 as a result of the competition. It denies that he suffered moral injury, and points out that he suffered no material injury as he was in receipt of a special allowance pursuant to Article 3.7 of the Staff Regulations. It points out that his request for disclosure of documents is redundant as it is identical to a request made in his first complaint, and it also forms the central issue of the third complaint.

Regarding the receivability of the third complaint, the Organization holds the view that the relevance of a request for disclosure of specific documents can only be examined in relation to the decision to which the documents relate. In this case the issue of disclosure is linked to the decision to set aside the competition and should therefore have been raised solely in the context of the first complaint. It could not form the gravamen of a separate complaint. The same applies to his claim for costs for his internal appeal.

On the merits of the third complaint, the Organization asserts that the central issue is whether the decision of 2 June 2003 contained sufficient information to enable the complainant to formulate an appeal. It holds the opinion that the Organization's letter of 2 June 2003 satisfied the request for information contained in the complainant's minute of 15 April 2003. Despite that, it also voluntarily agreed to disclose a considerable number of confidential documents to the complainant, holding back those that related to third parties. It points out that his supervisor's notes of a meeting held on 11 April 2002 relate to a third party and for this reason have been submitted to the Tribunal under confidential cover.

D. In the rejoinder filed in connection with his first complaint, the complainant does not agree that he was shielded from injury. He presses his claim for costs, given that the Joint Panel made recommendations in his favour with regard to two of the internal grievances he filed.

In his rejoinder in the context of the second complaint, the complainant calls into question the good faith of the Organization. He believes it portrayed him as making significant procedural mistakes so that it could avoid having to deal with the substance of his case. Its "continuing" bad faith in his opinion justifies an award of damages. He reiterates that he has a legal entitlement to be awarded the promised promotion to P.5.

In the rejoinder relating to his third complaint, he again calls into question the good faith of the Organization. He states that his request for document disclosure was justified because Article 13.3 of the Staff Regulations entitles an official to the disclosure "of all material relevant to the outcome of the process". By the terms of that article, when documents are withheld the onus is clearly on the Office, and more particularly the Director of HRD, to request the Ombudsperson's opinion as "to whether such documents or information should be disclosed". In his case, the Office did not do that. He himself referred his request for documents to the Ombudsperson. The issue is therefore whether the Office followed due process. He seeks an order that his legal costs will be met in full.

E. In all three surrejoinders the Organization maintains its objections to the receivability of the complaints.

In its surrejoinder on his first complaint, it states that there were ample grounds to warrant the annulment of the competition, but the complainant could be held responsible for the shortcomings in the competition process. The annulment was therefore effected in such a way as to ensure that he did not suffer any "negative consequence".

With regard to the second complaint, the Organization points out in its surrejoinder that one of the conditions on which promotion depended was that he be the holder of the post of chief of the Spanish Unit. That was no longer

the case, because competition 2001/4 was set aside *ab initio*, and his assignment became a temporary one to a vacant post. There is thus no legal basis for a promotion to the P.5 level.

In its surrejoinder on the third complaint, the Organization states that at issue is the scope of its obligation of disclosure under Article 13.3. It opposes the complainant's view that there had been inadequate disclosure of documents by the Office. It contends that it acted with transparency in all its dealings with the complainant and cannot be accused of bad faith.

CONSIDERATIONS

1. The three complaints, which arise out of the same facts and involve related questions of law, have been joined by the Tribunal to form the subject of a single ruling. The initial decision giving rise to the complaints was a decision of 10 April 2003 to set aside a competition for the post of Head of the Spanish Unit to which the complainant had been appointed and to declare that post vacant.

2. The first complaint was filed with the Tribunal on 1 September 2003, within 90 days of a letter dated 2 June 2003 which affirmed the earlier decision of 10 April. In the letter of 2 June the complainant was informed, amongst other things, that he could "submit a complaint [to the Tribunal] within 90 days from the date of the present letter, which has to be considered as a final administrative decision in the sense of Article VII(1) of the Statute of the Tribunal". By this complaint, it is sought to have the decision to set aside the competition reversed and to have the complainant's appointment confirmed.

3. Although the post in question was originally advertised at P.5, the complainant was appointed at the P.4 level on the basis that he would be promoted to P.5 after one year's satisfactory performance. It is not at issue that his performance was satisfactory for that period which concluded on 1 April 2003, ten days before the decision was taken to set aside the competition and to declare the post vacant.

4. On 16 June 2003, after a satisfactory performance appraisal report completed on 13 May 2003, the complainant requested that he be promoted to P.5. He did not then seek to have the decision of 10 April 2003 reversed. Having received no reply, he filed a first grievance with the Joint Panel on 15 September 2003. Again, he did not seek to have the decision of 10 April reversed. The Joint Panel proceeded on the basis that the only issue to be decided was whether "in view of the cancellation of the competition *ab initio* the [complainant was] still entitled to a P.5 grade as promised in the initial appointment". It recommended that the promotion be granted as from 1 April 2003, presumably on the basis that it be a personal promotion.

5. The Director-General decided to reject the recommendation of the Joint Panel that the complainant be promoted to P.5. That decision, contained in a letter of 23 January 2004, is the subject of the second complaint by which the complainant seeks wider relief than originally requested, including reinstatement as "Head of the Spanish Unit, Grade P5" together with all entitlements he would have received "had his appointment and promotion not been irregularly quashed". The relief to be granted pursuant to the second complaint, if any, must be limited to that originally claimed, namely promotion to P.5 on the basis that the decision to cancel the competition and to declare the post in question vacant still stands. That being so, the second complaint will fall for decision only if the complainant fails to have the decision of 10 April 2003 reversed, as sought in his first complaint.

6. The third complaint challenges a decision by the Director-General, contained in a letter of 10 March 2004. By that decision the Director-General rejected the recommendation of the Joint Panel that the complainant be paid 3,000 Swiss francs in costs in respect of the grievance he filed seeking disclosure of documents as well as other information bearing on the decision of 10 April 2003. The complainant had sought information as early as 14 April 2003. Later, on 19 May, he filed a request for information with the Ombudsperson. In her report dated 10 September 2003 the Ombudsperson stated that the complainant had a right to document disclosure by virtue of Article 13.3.1 of the Staff Regulations, and proposed that the complainant's supervisor should urge HRD to follow the procedure set out in that article. As the matter had not been resolved, on 28 October 2003 the complainant filed his second grievance with the Joint Panel. Documents were subsequently provided to him in December 2003 and in January 2004. Thereafter, in its recommendation on his second grievance, the Joint Panel recommended payment of 3,000 francs towards the complainant's legal costs.

Receivability and abuse of process

7. The Organization contends that the complaints with which the Tribunal is now concerned are either irreceivable or constitute an abuse of process because the complainant has proceeded in a manner inconsistent with his first complaint and has lodged “procedurally contradictory” complaints.

8. When his first complaint was filed, proceedings in the Tribunal had already been commenced by an unsuccessful candidate in respect of the competition which resulted in the complainant’s appointment. That candidate contended that the complainant did not possess the minimum qualifications for the post required by the vacancy announcement. With the Tribunal’s leave, the complainant did not file his corrected complaint until after those proceedings were determined, by Judgment 2287 in February 2004, in favour of that unsuccessful candidate. Thus, the Organization did not become aware of the filing of his first complaint until March 2004. In the meantime, the complainant had filed his third grievance with the Joint Panel on 28 November 2003, raising the same issues as those presented by his first complaint. Neither he nor his legal adviser who subsequently appeared for him before the Joint Panel informed the Organization that the complaint had been filed.

9. The failure of the complainant’s legal representative to inform the Organization and, seemingly, the Joint Panel of the filing of the first complaint with the Tribunal is, at the very least, contrary to ordinary standards of professional conduct. Moreover, the pursuit of internal appeal procedures when a complaint has already been filed with the Tribunal will ordinarily constitute an implied withdrawal of the complaint. However, that implication should not be drawn where, as here, the internal procedure is held to be beyond competence pursuant to a preliminary hearing limited to that issue and the decision as to competence is not contested. In such circumstances, the internal appeal procedures must be treated as a nullity, albeit that they occasion expense and inconvenience to all concerned. Accordingly, the first complaint is receivable.

10. The second complaint filed with the Tribunal is, in one sense, inconsistent with the first complaint. However, the subject of the second complaint is the issue identified by the Joint Panel, namely, whether the complainant was entitled to promotion to P.5 notwithstanding that the competition had been cancelled and is, thus, more accurately identified as an alternative claim. That being so it does not constitute an abuse of process. Nor is the third complaint in any way inconsistent with either of the other two complaints filed with the Tribunal. Accordingly, it is likewise not an abuse of process. Both the second and third complaints are, thus, also receivable.

The first complaint: minimum qualifications for the post

11. The complainant impugns the decision to set aside the competition in question on various grounds, including anti-union bias. Those grounds need not be considered in any detail as it must be held that the complainant did not satisfy the requirement of “at least five years experience at the international level in a senior position”. Standing alone, that expression may convey different meanings to different people, as it apparently did to members of the selection panel. However, it must be understood in the context of ILO classification standards applicable to translators. So understood, it is not apt to refer to the functions performed by the complainant as General Secretary and senior representative of the ILO Staff Union. Nor is it apt to include work performed for a commercial entity operating in the international field, save where that work involves close liaison with an international body. The work performed by the complainant for the Beverli Group of Companies in Madrid does not fall within that qualification. As the complainant relies chiefly on his work with those companies and his responsibilities with the Staff Union, it must be concluded that he did not satisfy the requirement of “five years experience at the international level in a senior position”. Given that conclusion and the fact that it is not disputed that the unsuccessful candidate who filed the complaint that led to Judgment 2287, did possess the necessary experience, the Director-General’s decision to cancel the competition leading to the complainant’s appointment as Head of the Spanish Unit must stand.

Circumstances surrounding the impugned decision and the third complaint

12. Although the Director-General’s decision to cancel the competition and to vacate the post to which the complainant was appointed must stand, it does not follow that the first complaint should be dismissed in its entirety. An international organisation has a duty to act in good faith towards its employees and to protect their dignity. Unfortunately, the circumstances surrounding the Director-General’s decision show scant regard for the dignity of the complainant.

13. At the time of the competition in question, the Spanish Unit was in a troubled state as a result of personality conflicts. Indeed, the selection panel noted that the task of the successful candidate would be difficult. The already difficult situation was undoubtedly exacerbated when the unsuccessful candidate made it known that she would not acknowledge the complainant's appointment and would not work with him. Given that there was room to question the nature of the requirement for experience "at the international level in a senior position" and given, also, the nature of the difficulties in the Spanish Unit, the duty to act in good faith and to protect the complainant's dignity obliged the Organization to conduct an immediate investigation into the matter. Instead, it maintained that the complainant possessed the necessary qualifications and so contended in proceedings instituted by the unsuccessful candidate before the Joint Panel. Presumably, it took that course because the complainant's efforts in the post resulted in considerable improvement in the Unit and it wished to retain the benefit of his efforts.

14. In its recommendation on the grievance initiated by the unsuccessful candidate, the Joint Panel expressed doubt as to whether the complainant possessed the specified minimum qualifications, particularly that relating to experience at the international level in a senior position. However, it recommended that the grievance be dismissed because the complainant had been appointed at the P.4, rather than the P.5 level. Even this did not prompt investigation as to the complainant's qualifications. That only occurred after the unsuccessful candidate wrote to the Director-General claiming that the complainant had made false statements in his application. Her allegations were referred for investigation, including for possible disciplinary action. The Director-General also referred the allegations to the Joint Panel which expressed its concern with the approach taken by the unsuccessful candidate. In particular, it expressed its concern that she had approached and obtained information concerning the complainant from outside organisations.

15. On 5 December 2002 the complainant was asked to explain what were said by HRD to be discrepancies in his application for the post. The complainant replied in writing stating that the information he had provided was not misleading and asserting that he had the requisite experience for the post. HRD concluded that the complainant had not "fraudulently misrepresented his qualifications" and that, to the extent that there were inaccuracies, they had had no effect on his selection. However, it also noted that different opinions had been expressed as to whether he had the requisite qualifications and concluded that, save for his experience as a translator and reviser, he did not. HRD did not specify in what respect the complainant lacked the other two experience requirements referred to. It did, however, make other observations about the selection process, including that there had been bias in favour of the complainant and against the unsuccessful candidate. In the result, it recommended that the competition be set aside and the post vacated.

16. The Director-General accepted the recommendation of HRD and the complainant was so informed by a minute of 10 April 2003. The minute informing the complainant of the decision stated that:

"[...] some aspects of the competition procedure ha[d] not been such as to guarantee the required transparency and objectivity, in particular concerning the minimum requirements for the post and the manner in which they ha[d] been applied in respect of the various candidates."

The minute fell short of stating that the complainant lacked the necessary qualifications and, if that were to be implied, in what respect they were lacking. Moreover, it did not say anything as to the "discrepancies" which he had earlier been asked to explain.

17. The complainant met with the Director of HRD on 14 April and wrote to him the following day confirming his request for information, which included:

"The specific reasons that led [to his appointment] at the P4 grade";

"The specific aspects of the competition that, despite the opinion of the Joint Panel, did not offer the conditions of transparency and objectivity required"; and

"The reasons that led to the decision [of 10 April 2003] without even having given [him] the possibility of commenting on the allegations [...]"

He also asked for a copy of the Joint Panel's report on the grievance of the unsuccessful candidate and for "any document that could have served as the basis for the Director-General's decision".

18. The complainant received no reply to his minute of 15 April until 2 June 2003 when he was informed that

the decision to set aside the competition “was not based on any allegation about [him]”, nor on his experience as translator-reviser, but on the fact that he “did not meet the other two objective [experience requirements]”. Apart from experience at the international level in a senior position, the advertised position had required “[e]xperience in the organization of translation and revision work during meetings and conferences”. Again, the letter of 2 June did not specify in what respects the complainant failed to meet those requirements. However, it was claimed in that letter that the conclusion that he did not meet the specified requirements was corroborated by “the fact that [he] accepted [...] an appointment [...] at a lower grade”, as well as by “a series of comments [he] made during the [...] investigation”. It should be noted that his acceptance of appointment at a lower grade is explicable on a number of bases other than his acknowledgement that he lacked the required experience. As to the comments allegedly made during the investigation, there is nothing to indicate the nature of what it was claimed was then said.

19. The letter of 2 June also informed the complainant that no further documents would be provided to him as they referred “either to internal opinions between the Director-General and his advisers, or to a process initiated by another official”. In the meantime, the complainant had, on 19 May 2003, sought the assistance of the Ombudsperson in obtaining documents and information relating to the Director-General’s decision to annul the competition. He sought that assistance on the basis of Article 13.3 of the Staff Regulations which provides, subject to an exception which will be dealt with shortly, that for the purpose of appeal proceedings, “an official shall be entitled to the disclosure of all material relevant to the outcome of the process”. The exception allows that documents may be withheld but requires that the Director of HRD shall immediately request the Ombudsperson’s opinion and that that opinion be provided within ten working days from the receipt of the request. No such request was made of the Ombudsperson in this case.

20. In a report dated 10 September 2003, the Ombudsperson recommended that the Director of HRD follow the established procedures with respect to disclosure of documents and information. No action was taken on that recommendation and on 28 October, the complainant filed a grievance with respect to the matter with the Joint Panel. Subsequently, the complainant was provided with further documents and the Joint Panel recommended payment of 3,000 Swiss francs in legal costs. That recommendation was rejected by the Director-General on the grounds that the complainant had not specifically identified any documents before 4 December 2003 and that legal representation is not necessary in proceedings before the Joint Panel.

21. Significantly for this aspect of the complaints before the Tribunal, the several reasons which led the Director-General to conclude that there were “grave doubts” as to “the transparency and objectivity of the [competition] process” were not articulated until the filing of the Organization’s reply on the complainant’s first complaint before the Tribunal. The complainant was, thus, denied any opportunity to address those issues. Further, and contrary to what is contended in the reply, it is simply impossible, in a context in which the matters which gave rise to his doubts were never articulated, to say that “the Director-General gave an opportunity to all interested parties to make their views known”. And although the eight matters specified in paragraph 44 of the reply may have raised doubts in the mind of the Director-General, they neither establish that the process was unfair nor, as stated by HRD in its advice to him, do they establish that there was bias in favour of the complainant and against the unsuccessful candidate.

22. Moreover, the specific matters which are said to indicate that the complainant lacked the requisite qualifications for the post of Head of the Spanish Unit were also not articulated until the filing of the Organization’s reply on the first complaint. As already indicated, the complainant did not have the requisite five years’ experience at the international level in a senior position. However, and although the Organization contends otherwise, his experience as co-ordinator for the night shift of the Spanish Unit for the European Regional Conference in 2000 and as co-ordinator of the Spanish translation team for the Finance Committee in 2001 clearly satisfies the requirement of “[e]xperience in the organization of translation and revision work during meetings and conferences”.

23. The Director-General’s decision to cancel the competition and to vacate the post to which the complainant was appointed must stand only because the requirement of experience at the international level is to be interpreted in the manner indicated above. Clearly, as is indicated in the Organization’s reply on the first complaint, different people took different views as to that requirement which, standing alone, lacked precise meaning. The failure to take timely steps to clarify the meaning of that requirement, to specify in what manner the complainant lacked the requisite experience, to provide documents and information in regard to the decision or to follow the procedures in relation to the provision of those documents and information, demonstrates a serious disregard for the complainant’s dignity and a failure to act in good faith towards him. Accordingly, he is entitled to moral damages

as claimed in the first complaint. The Organization's suggestion that that claim for moral damages is irreceivable because it was made neither when the complainant sought further information and reconsideration of the decision on 15 April 2003 nor when he lodged his grievance with respect to the decision on 28 October of that year must be rejected. The claim was made at the first real opportunity, namely, when the first complaint was filed with the Tribunal in September 2003. Moral damages should be assessed at 30,000 Swiss francs.

24. Given the Organization's failure to comply with its own procedures for the provision of documents and information regarding a decision affecting the complainant, it was entirely reasonable for him to seek legal representation in the proceedings before the Joint Panel. Moreover, given the absence of any precise reason for the decision to set aside the competition and the failure of the Organization to follow its own procedures, the decision of 10 March 2004 to reject the Joint Panel's recommendation with respect to the payment of the costs of legal representation cannot be sustained on the basis that the complainant did not specifically identify the documents to which he required access. Accordingly, the Director-General's decision of 10 March 2004 not to accept the recommendation of the Joint Panel is set aside. Instead, it will be ordered that costs of the proceedings before the Joint Panel be paid in accordance with its recommendation.

The second complaint

25. As already indicated, the complainant was appointed Head of the Spanish Unit on the basis that he would be promoted to P.5 after one year's satisfactory service. The precise terms of the minute of 26 March 2002 recording this understanding are:

"On the recommendation of the Director-General, [the complainant] would be promoted to P.5 on completion of a satisfactory performance appraisal after one year in the post."

As at 10 April 2003, the complainant had completed the specified year of service and his supervisor had made it known that a satisfactory appraisal report would be issued. The appraisal report was completed on 13 May of that year. The minute of 10 April notifying the complainant of the cancellation of the competition and the vacating of the post to which he had been appointed stated that the decision had no effect on the grade at which he had been initially appointed. It made no reference to the question of promotion; nor did the letter of 2 June which was said to be the final administrative decision, although a satisfactory appraisal report had then been made. On 16 June the complainant requested promotion to P.5 retrospective to 1 April 2003. On 15 September he filed a grievance with respect to that claim with the Joint Panel which, as already noted, recommended his promotion.

26. The Director-General's decision to reject the recommendation of the Joint Panel was based on the view that the complainant's position was adequately protected by maintaining him at the P.4 grade and that the annulment of the competition altered the legal position between the date of the promise and the date on which fulfilment was due. In this last respect, the decision referred to Judgment 782. In its reply on the second complaint, the Organization raises other arguments, claiming that no promise can be inferred, namely because the word "would" was used in the minute of 26 March 2002 and because promotion "was contingent on several conditions". So far as these additional arguments are concerned, they raise only the questions as to whether there was a promise, a matter admitted in the letter of 23 January 2004 conveying the Director-General's decision to reject the recommendation of the Joint Panel, and, if so, whether the conditions attaching to the promise were satisfied. It is clear from the correspondence relating to the complainant's appointment that all persons understood him to have been promised a promotion to P.5 after one year's satisfactory performance.

27. In essence, the Organization is contending that it is relieved of its promise because, although the complainant performed all the functions and the duties of the post in question and performed them satisfactorily for one year, he did not perform them "in the post". That is because the effect of the decision of 10 April 2003 was that, as a matter of law he was never appointed to that post. The Organization was responsible for appointing the complainant to the post. It is also responsible for the consequences of its decision in that regard.

28. Because the setting aside of the complainant's appointment was the direct consequence of its own unlawful actions, the Organization cannot now be heard to say that the conditions which were attached to its promise and which were performed in substance and in fact, were not performed in law. Accordingly, the complainant is entitled to a promotion to P.5 as from 1 April 2003, in line with the recommendation of the Joint Panel. Of course, in the resulting financial calculation, he must give credit for the payment of an allowance for acting in the position in question for the period commencing from that date. As the complainant has had the benefit of that allowance

since 1 October 2002, there is no occasion for the awarding of moral damages in respect of the second complaint.

Oral hearing and production of documents

29. The complainant has requested an oral hearing in which to call witnesses. As the matters falling for decision in relation to each of the complaints are essentially questions of law, there is no need for the calling of witnesses or for an oral hearing. The same consideration renders it unnecessary to order the production of further documents as requested in the third complaint.

30. As the complainant has had a significant measure of success, he should receive an award of costs in the sum of 10,000 francs.

DECISION

For the above reasons,

1. The Director-General's decisions of 23 January 2004 and 10 March 2004 rejecting the recommendations of the Joint Panel with respect to the complainant's promotion to P.5 and the payment of his legal costs relating to his grievance with respect to the production of documents, respectively, are set aside.
2. The Director-General is to promote the complainant to P.5 with effect from 1 April 2003.
3. The Organization shall pay the complainant 3,000 Swiss francs for legal costs associated with his grievance before the Joint Panel relating to the production of documents.
4. It shall pay the complainant moral damages in the sum of 30,000 francs.
5. It shall also pay him the costs of these proceedings in the sum of 10,000 francs.
6. The claims are otherwise dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

 * Registry's translation.